REPUBLIC OF KENYA

High Court at Meru

Criminal Appeal 48 of 2010

JUDY NKIROTE…….……...……...…APPELLANT

VERSUS

REPUBLIC …….……..RESPONDENT

J U D G M E N T

The Appellant was charged before Chief Magistrate's Court Meru with one count of being in possession of Changa. She was convicted on her own plea of guilt. After the probation report turned out unfavourable to the Appellant, she was sentenced to six months imprisonment with no option of a fine. The Appellant was granted a free bond by Hon. Kasango J. on 15th March, 2012 following a successful Chamber Summons Application for bail pending appeal.

When the appeal came up for hearing Mr. Kimathi Kiara argued it on behalf of the Appellant. Mr. Kiara argued ground No. 1 of the Petition of Appeal to the effect that the learned trial magistrate erred in law and in fact in convicting the Appellant on a plea of guilty which was not unequivocal. Mr. Kiara submitted that the language used by the court during the plea was not indicated. Mr. Kiara argued further that after the charge was read to the Appellant the prosecution did not provide any facts for the case. He submitted that the plea was in the circumstances flawed. Counsel urged that if the court would consider ordering a retrial it should find it unviable because the exhibit which was changa'a was destroyed two years ago after the Appellant's conviction. He urged that in the circumstances a retrial would be an exercise in futility.

Mr. Moses Mungai represented the State in this appeal. He has opposed the appeal. Mr. Mungai argued that the particulars of the charge were read to the Appellant and that the record clearly indicated as much. Mr. Mungai urged that "**facts as per charge sheet'** were sufficient facts for the offence.

This is a first Appeal. I have considered the Appeal together with the submissions by both counsels. The Appellant was convicted on her own plea of guilty. The proceedings are very brief and were as follows:

"Court:

The substance of the charge and every element thereof has been stated by the court to the accused person(s) in the language she understand, who being asked whether she admits or denies the truth of the charge(s) replies.

I unlawfully had changa'a.

K. W. KIARIE –

S.P.M.

Pros: Facts as per charge sheet.

K. W. KIARIE

S.P.M.

COURT: Accused convicted on own plea of guilty.

K. W. KIARIE

S.P.M."

I have considered the manner in which the plea was taken. From the record of the proceedings the learned trial magistrate read the charge to the Appellant who admitted them. The learned trial magistrate required the facts of the case from the prosecution. In response the prosecutor stated to the court that the facts of the case were as per the charge sheet. The question is whether any facts were read by the prosecution and whether the conviction on such facts was unequivocal.

In the celebrated case of **ADAN VRS REPUBLIC 1973 EA 445** the Court of Appeal for Eastern Africa set out the steps that a plea court should take in order to record a proper plea. The Court of Appeal held:

(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

(iv) If the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

(v) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

In recent years our Court of Appeal in the case of **KARIUKI VS REPUBLIC 1984 KLR 809** considered the manner of recording a plea and while adopting the decision of **ADAN VRS REPUBLIC**, supra, held as follows:

1. The word "do" recorded by the trial court as the accused persons answer to the facts of the offence meant nothing and was neither an admission nor a denial of the facts.

2.The manner in which a plea of guilty should be recorded is

(a) The trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understand;

(b) He should then record the accused's own words and if they are an admission, a plea of guilty should be recorded;

(c) The prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.

(d) If the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply – Adan v. Republic [1973] EA 445."

The Cardinal rule when taking a plea is that the Court should ensure that an accused person fully understands what it is that he is accused of committing and the manner he is accused of having committed the offence. This is more important where an accused person is unrepresented. This is the reason why the court reads the charge to the accused person and takes a further step of stating and explaining to the accused every element of the charge which constitutes the offence he or she is facing, and in a language he or she understands. After the charge is explained to an accused person the prosecution is then required to outline the facts of the alleged offence before a conviction or otherwise is recorded.

The facts of the prosecution case are supposed to give further details of what it is the accused person is accused of doing or failing to do which led to the circumstances which constitute the offence charged. The statements of facts given by the prosecution must be explained to the accused person by the court in order for the court to be certain that he has understood the facts. The accused is then given an opportunity to either admit or deny those facts. At that point the court should give the accused person an opportunity not merely to admit or deny but also to dispute the facts or explain the facts or add any relevant facts. If the accused person denies the facts then a plea of not guilty is entered. If he admits the facts then the court will enter a plea of guilty and convict him for the offence.

At the time the statements of facts are read by the prosecution and before the accused person is required to plead to those facts the court has a judicial role to play of considering the facts stated by the prosecution and determining whether those facts as read disclose the offence charged, and whether the facts also support the offence charged. If the particulars of the facts led by the prosecution do not support the offence charged or where they do not disclose the offence charged, the court should reject the charge under section 89(5) of the Criminal Procedure Code. A court cannot exercise that discretion if no facts are led by the prosecution. The court will not also be able to explain the facts to the accused if no facts are led by the prosecution.

In the instant case after the charge was explained to the Appellant the prosecution did not give any facts but stated "facts as per the charge sheet". At that juncture what the learned trial magistrate ought to have done was to enter a plea of not guilty and set down the case for hearing in order to give the prosecution an opportunity to call evidence out of which the facts of the case would be derived. A conviction could not and cannot result out of a plea to a charge alone where no facts are led.

The Appellant was facing an offence of being in possession of Changaa as stated above. In addition to the requirement that facts ought to have been read and explained to the Appellant at the plea stage, the prosecution should also have produced the Exhibit alleged to be changaa and should have gone further to produce a Government Analyst Report confirming that the liquid was indeed changaa. This was omitted entirely. That omission is equally fatal to the prosecution case.

The procedure adopted by the learned trial magistrate in arriving at a conviction in this case was defective. That renders both the plea of guilty entered and the conviction null and void. Consequently the conviction entered against the Appellant is set aside.

The issue is whether the court should order a retrial in this matter

In the case of **AHMEND SUMAR VS. REPUBLIC (1964) E.A. 481**, at page 483, the Court of Appeal for Eastern Africa stated as follows:-

"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view, follow that a retrial should be ordered.

We are also referred to the judgment in Pascal Clement Braganza Vs. R. [1957] EA 152. **In this judgment the Court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to an accused person."**

The record shows that this plea was taken on 22nd February, 2010. As the counsel for the Appellant rightly observed the exhibit is likely to have been destroyed. There will be no exhibit with which to try the Appellant in this case. I find that the interest of justice would not require a retrial to be ordered in this case. Not only has there been a long lapse of time since the Appellant took plea but the exhibit for which she was charged was not produced in court during plea. If it was not exhibited, the possibility of the Appellant having a fair and authentic trial in the circumstances is highly compromised. I decline to order a retrial.

Since the Appellant was released on her own personal bond I discharge of the same.

Those are my orders.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF FEBRUARY, 2013.

LESIIT, J.
JUDGE